No. 22,043

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JEWELL JAMES WILLIAMS,

Appellant,

v.

FRANK GIBSON, HENRY A. BONEY, ROBERT C. DENT, DE GRAFF AUSTIN and ROBERT C. COZENS, as members of the Board of Supervisors of San Diego County (State of California) and JOSEPH C. O'CONNOR, Sheriff of San Diego County (State of California),

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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CITATIONS

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PRELIMINARY STATEMENT

This brief is filed on behalf of the United States as us curiae, pursuant to the Court's order of April 25, 1968.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether 18 U.S.C. 4042 -- which charges the Bureau risons with the duty of providing suitable quarters for

federal prisoners -- creates a federal claim against individu state or local jailers charged with the custody of federal pr oners under contract with the Bureau of Prisons.

2. Whether the district court was required, under the doctrine of pendent jurisdiction, to assume jurisdiction ove the prisoner's state claim.

3. Whether the Sheriff of San Diego County and the Cou Board of Supervisors are "employees" of the United States wi respect to federal prisoners in the Sheriff's custody.

STATEMENT OF THE CASE

This is a suit by a prisoner who, at the time the suit arose, was in the custody of the San Diego County Sheriff awaiting trial of a federal charge (R. 2). Defendants are t San Diego County Sheriff, the members of the Board of Super- visors of San Diego County, and the United States (R. 1-2). The amended complaint alleges that defendants "did negligentl perform their duty of providing for the safekeeping, care an protection of plaintiff and as a direct and proximate result of said negligence, plaintiff was severely and permanently injured." (R. 2). The district court dismissed the action as to all defendants other than the United States, on the ground that there was no diversity of citizenship (R. 39-41). The court also noted that the complaint did not allege the filing of an administrative claim, required by California law as a prerequisite to a tort suit against a state or local of- ficial (R. 42-43). This appeal followed.

In a separate suit against the United States under the
eral Tort Claims Act, plaintiff charged negligent super-
on by the Sheriff of San Diego County, as a result of
n plaintiff was assaulted and injured by a fellow prisoner
14-16). The district court dismissed this complaint on
ground that the United States is not liable under the Tort
ms Act for the acts of the San Diego County Sheriff:

> This Court takes judicial notice of the fact that persons in custody of the United States are lodged in the custody of the San Diego County Jail in accordance with the terms of a contract between the two governmental bodies. Under that contract the San Diego County Jail and its employees are independent contractors, and not employees of the United States. The United States is not liable for the alleged negligence of an independent contractor.

16). An appeal followed. This Court held that the dis-
al of the complaint was not a dismissal of the action and
ordingly was not appealable; it directed the district court
grant leave to amend the complaint. Williams v. United
tes, 389 F. 2d 35. Plaintiff's time to file an amended
plaint in that case has been extended until the disposition
the instant appeal.

STATUTES INVOLVED

28 U.S.C. 1331 provides in relevant part:

> The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000 exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States.

18 U.S.C. 4002 provides in relevant part:

> For the purpose of providing suitable quarters for the safekeeping, care and subsistence of all persons held under authority of any enactment of Congress, the Director of the Bureau of Prisons may contract, for a period not exceeding three years, with the proper authorities of any State, Territory, or political subdivision thereof, for the imprisonment, subsistence, care, and proper employment of such persons.
>
> * * * * *
>
> The rates to be paid for the care and custody of said persons shall take into consideration the character of the quarters furnished, sanitary conditions, and quality of subsistence and may be such as will permit and encourage the proper authorities to provide reasonably decent, sanitary, and healthful quarters and subsistence for such persons.

18 U.S.C. 4042 provides in relevant part:

> The Bureau of Prisons, under the direction of the Attorney General, shall —
>
> (1) have charge of the management and regulation of all Federal penal and correctional institutions;
>
> (2) provide suitable quarters and provide for the safekeeping, care, and subsistence of all persons charged with or convicted of offenses against the United States, or held as witnesses or otherwise;
>
> (3) provide for the protection, instruction, and discipline of all persons charged with or convicted of offenses against the United States.

The Federal Tort Claims Act, 28 U.S.C. 2671, provides in vant part:

> As used in this chapter and sections 1346(b) and 2401(b) of this title, the term —
>
> "Federal agency" includes the executive departments and independent establishment of the United States, and corporations primarily acting as, instrumentalities or agencies of the United States but does not include any contractor with the United States.
>
> "Employee of the government" includes officers or employees of any federal agency, members of the military or naval forces of the United States, and persons acting on behalf of a federal agency in an official capacity, temporarily or permanently in the service of the United States, whether with or without compensation.

ARGUMENT

Summary

1. The complaint did not state a claim against the San go County officials as to which the district court had isdiction, under 28 U.S.C. 1331, to grant relief. The al- ations of the complaint amount only to an action for neg- ence under state law. The prisoner's reliance on 18 U.S.C. 2 does not establish federal question jurisdiction. That tute merely states the duty of the Bureau of Prisons to vide suitable custody of federal prisoners. As such, it simply a statute delineating the duties and responsibilities a federal agency. It was not intended to create a federal se of action against individual jailers -- be they employees

of the Bureau of Prisons or independent contractors -- for failure to provide adequate custody. Nor is there any general doctrine which brings into the federal courts actions against individual federal employees or government contractors for failure to fulfill the duties of the federal agency which employs them, or contracts with them. Wheeldin v. Wheeler, 373 U.S. 647.

2. The district court did have jurisdiction to determine whether the complaint stated a federal claim. However, this was not sufficient to require the district court to assu jurisdiction over the state negligence claim under the doctri of pendent jurisdiction. That doctrine does not require a district court to hold a trial on a state claim where federal jurisdiction in a case was assumed only for purposes of dismissing the purported federal claim on the pleadings.

3. The Sheriff and the members of the Board of Supervisors of San Diego County are not employees of the United States for purposes of the Tort Claims Act. The provision of the Act which defines "employees" to include "persons acting on behalf of a federal agency in an official capacity" was intended to refer to persons rendering service to the government on a temporary basis, or without compensation or for a nominal salary, as, for example, the "dollar a year man." Appellant's interpretation of this language would cover virtual any government contractor, since government contractors generally perform activities which are delegated by statute to

ontracting federal agency. Such a result would be com-
ly at variance with the basic purpose of the Federal Tort
s Act, which is to render the Government liable in gen-
y the same circumstances as a private employer is liable
state law for the torts of his employees.

I.

18 U.S.C. 4042 MERELY SPECIFIES THE RESPONSIBILITIES OF THE BUREAU OF PRISONS; IT DOES NOT CREATE A FEDERAL CAUSE OF ACTION FOR DAMAGES AGAINST INDIVIDUAL JAILERS.

Although his primary contention in the district court was
there was diversity jurisdiction, the prisoner has aban-
that point on appeal and now contends that federal juris-
on existed because a federal question was raised under
S.C. 4042. That statute provides that "[t]he Bureau of
ns, under the direction of the Attorney General, shall
provide suitable quarters and provide for the safekeep-
care, and subsistence of all persons charged with or con-
d of offenses against the United States." The Bureau is
charged with the duty of providing for "the protection,
uction, and discipline" of such persons. Id. The com-
t charged that appellees failed to comply with the statute,
t is contended that this allegation conferred federal
ion jurisdiction under 28 U.S.C. 1331.[1/]

The prisoner's complaint and his briefs in the district
did not cite 28 U.S.C. 1331 as a basis for jurisdiction.
ave to the briefs of the parties the question of whether
risoner may raise the issue of federal question juris-
on on appeal.

In our view, 18 U.S.C. 4042 was designed to delineate the duties and responsibilities of a federal agency; it was not designed to create a federal cause of action against either individual employees of that agency, or against persons with whom the agency might enter into contracts. There are, of course, many statutes delineating the duties and responsibilities of the various federal agencies. But we are unaware of any authority construing such a statute to give a federal cause of action against federal employees -- or against persons contracting with the federal agency -- to recover damages on account of failure by the employee or the contractor to fulfil the statutory duties of the agency. Accordingly, the complain failed to state a claim as to which the district court had jurisdiction to grant relief under 28 U.S.C. 1331. 2/

2/ Of course, there is federal question jurisdiction under 2 1331 to decide whether the prisoner has stated a federal cause of action. Bell v. Hood, 327 U.S. 678. However, dismissal is required if no federal cause of action is established, and there is no other basis for federal jurisdiction; for in that event the federal court has no jurisdiction to grant relief. See Montana-Dakota Co. v. Pub. Serv. Comm., 341 U.S. 246, 249-50: "Petitioner asserted a cause of action under the Power Act. To determine whether that claim is well founded, the District Court must take jurisdiction, whether its ultimate resolution is to be in the affirmative or the negative. If the complaint raises a federal question, the mere claim confers power to decide that it has no merit, as well as to decide that it has. * * * We think a direction to dismiss for want of jurisdiction was error * * * . However, it is clear that the reason underlying the Court of Appeals' decision was that no federal cause of action was established. If this was correct, we should sustain the judgment * * * . See also Blaney v. Florida National Bank at Orlando, 357 F. 2d 27, 28 (5th Cir. 1966); Farkas v. Texas Instrument, Inc., 375 F. 2d 629, 631-2 (5th Cir. 1967), certiorari denied, 389 U.S. 977; Moungey v. Brandt, 250 F. Supp. 445, 448 (W.D. Wisc. 1966).

For these reasons, we believe that the question of whether County Supervisors and the Sheriff are federal employees -- purposes of the Tort Claims Act or for any other purpose -- ot relevant to this case. Congress did not intend in 18 C. 4042 to create a federal cause of action against either oyees of the Bureau of Prisons, or persons contracting with Bureau of Prisons. Thus the district court had no juris- ion to grant relief against appellees, and that is the end he matter. However, since the question of appellees' ged "employee" status has been discussed in the briefs and f great importance to the government, we shall discuss it oint III infra.

1. It is clear that not every violation of a federal ute gives rise to a federal cause of action for damages nst the violator. This is true even though the federal ute may prescribe a standard that is relevant to a state e of action. Thus it has been held that, although the ral Safety Appliance Act prescribes applicable standards, igence actions alleging violation of these standards, ght by intrastate workers, motorists, or passengers, arise r state law, where there is no express statutory right ue in a federal court. Moore v. C. & O. Ry. Co., 291 205; Andersen v. Bingham & G. Ry. Co., 169 F. 2d 328 h Cir. 1948); see Jacobson v. New York, N.H. & H. R.R., F. 2d 153, 157 (1st Cir. 1953). Nor can an ordinary neg- nce action by a person injured in an aircraft accident be

converted into a federal cause of action because the alleged negligence consisted of the pilot's violation of federal safe regulations issued under the Federal Aviation Act. Moungey v Brandt, 250 F. Supp. 445 (W.D. Wisc. 1966); cf. Boncek v. Pennsylvania R. Co., 105 F. Supp. 700 (D. N.J., 1952) (no fed eral question jurisdiction of negligence action alleging vio- lation of federal regulations regarding handling of explosive contra: Neiswonger v. Goodyear Tire and Rubber Co., 35 F. 2d 761 (N.D. Ohio, 1929). Similarly, a state cause of action fo breach of trust is not converted into a federal action becaus it is alleged that the trustee, a national bank, violated fed eral regulations governing trust departments of national bank Blaney v. Florida National Bank at Orlando, 357 F. 2d 27 (5th Cir. 1966).[3/] And, this Court has held that a trucker's oper tion without a certificate required under the federal Motor Carrier Act does not give rise to a federal cause of action o the part of a competing trucker, even though the violation of federal law may be relevant in a state action for unfair com- petition. Consolidated Freightways v. United Truck Lines, 21 F. 2d 543 (9th Cir. 1954), certiorari denied, 349 U.S. 905.

Thus it is not enough for the prisoner here to allege that there has been a violation of 18 U.S.C. 4042. He must also show that a federal cause of action was created by this

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3/ See also, Oppenheim v. Sterling, 368 F. 2d 516 (10th Cir 1966), certiorari denied, 388 U.S. 1011, holding that there w no federal question jurisdiction of an action for conspiracy and breach of trust, despite an allegation that defendants ha engaged in fraudulent use of the mails in violation of federa statute.

ıte, conferring federal question jurisdiction on the fed- courts. The fact that the federal statute may supply a lard relevant to a determination of whether the Sheriff he Board of Supervisors were negligent under state law, not mean that in 18 U.S.C. 4042 Congress intended to con- n federal prisoners a federal right to sue individual em- ees or contractors for negligence.

2. Although there have been several cases implying fed- causes of action from the substantive provisions of a fed- statute,[4/] we know of no case in which a federal action lamages has been implied against a federal employee or in- ndent contractor for failing to fulfill the duties of the oying or contracting federal agency. Indeed, in Wheeldin heeler, 373 U.S. 647, the Supreme Court refused to create leral cause of action for damages against an investigator he House Un-American Activities Committee who concededly beyond his authority in issuing a subpoena to the plain-

> When it comes to suits for damages for abuse of power, federal officials are usually governed by local law. * * * Congress could, of course, provide otherwise, but it has not done so. Over the years, Congress has considered the problem of state civil and criminal actions against federal officials many times. * * * But no general statute making federal officers liable for acts committed "under color," but in violation, of their federal authority has been passed. Congress has provided for removal to a federal court of any state action, civil or criminal, against "[a]ny officer of the United States * * *, or

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See generally Note, "Implying Civil Remedies from Federal latory Statutes," 77 Harv. L. Rev. 285 (1963).

> person acting under him, for any act under color of such office * * * ." 28 U.S.C. § 1442(a)(1). That state law governs the cause of action alleged is shown by the fact that removal is possible in a nondiversity case such as this one only because the interpretation of a federal defense makes the case one "arising under" the Constitution or laws of the United States. * * * We conclude, therefore, that it is not for us to fill any hiatus Congress has left in this area.

373 U.S. at 652. In so holding, the Supreme Court rejected t argument advanced in dissent that, since the federal employee had violated a federal statutory restriction on his authority a federal right of action for damages should be created. 373 U.S. at 661-63 (dissenting opinion of Brennan, J.). In Wheel the fact that the federal official had violated federal restr tions on his authority might well be relevant to a state acti for damages -- just as here, the standard of care set by 18 U.S.C. 4042 might be relevant to an action for negligence und state law. However, just as it was held in Wheeldin that the is no federal cause of action for abuse of power against a fe eral official who has violated a statutory restriction on his authority, so also must it be held here that there is no federal cause of action for negligence against federal officials alleged to have violated a statutory duty. 5/

5/ There are several cases holding that actions against federal officials and employees, alleging the commission of comm law torts in the course of official duty, do not come within federal question jurisdiction. Johnston v. Earle, 245 F. 2d 793 (9th Cir. 1957) (action against Internal Revenue Service employees for conversion); Viles v. Symes, 129 F. 2d 828 (10t Cir. 1942), certiorari denied, 317 U.S. 633 (action against federal judge and government attorneys for malicious (continue

Wheeldin v. Wheeler, supra, has also been applied in
s involving the violation by independent contractors of
es imposed by federal law. Thus in Farkas v. Texas In-
ment, Inc., 375 F. 2d 629 (5th Cir. 1967), certiorari
ed, 389 U.S. 977, it was held that there is no federal
e of action on the part of an employee of a government
ractor to enforce the non-discrimination clauses of the
ract, inserted pursuant to an Executive Order. And in
l Services, Inc. v. Maintenance Inc., 361 F. 2d 86 (5th
1966), it was held that the losing bidder for a federal
ract has no federal cause of action for loss of profits
nst the prevailing bidder, despite the allegation that the
ailing bidder obtained the contract in violation of fed-
regulations. In both cases, the federal government had
ght to enforce the contractor's federal obligations --
as here, the Bureau of Prisons may have a right to cancel
contract with any state or local prison found to be in
ation of 18 U.S.C. 4042. However, this does not mean
the prisoner has a federal right to damages against in-
dual officials for the contractor's breach of duty.

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continued) prosecution and false imprisonment); Mathers &
ers v. Urschel, 74 F. 2d 591 (10th Cir. 1935) (action
nst United States Attorney and FBI agents for return of
erty seized in connection with a federal arrest); Martin
yzanski, 262 F. Supp. 925 (D. Mass. 1967) (suit against
ral judge for libel); Mullins v. First National Exchange
of Virginia, 275 F. Supp. 712 (W.D. Va. 1967) (action for
ersion and interference with contractual rights against
cials of Small Business Administration). It is well estab-
ed that the fact that a case may be removable under 28 U.S.C.
does not mean that the case may be brought originally in a
ral court. Gay v. Ruff, 292 U.S. 25, 39.

3. Where a federal statute prescribing a substantive standard does not explicitly provide for a civil remedy, the Supreme Court has stated that "it is the duty of the courts to be alert to provide such remedies as are necessary to make effective the congressional purpose." J. I. Case Co. v. Bora 377 U.S. 426, 433. The statute on which the prisoner relies here to create a federal cause of action -- 18 U.S.C. 4042 -- was part of legislation passed in 1930 which established the Bureau of Prisons. 46 Stat. 325. The legislative history shows that the purpose of the statute was to centralize authority and responsibility for the conditions in federal prisons, and to give the Federal Government some authority to provide by contract for the proper treatment of federal prisoners in state jails. The legislation was proposed by the Department of Justice, which explained it in a memorandum reprinted in the committee reports (Sen. Rept. 533, 71st Cong., 2d Sess. at p. 2; H. Rept. 106, 71st Cong., 2d Sess., at p. 2 and quoted during the floor debate by the bill's sponsor (72 Cong. Rec. 2158 (Rep. Graham, Jan. 22, 1930)):

> At present there is no organization legally charged with the duty of administering the penal and correctional institutions of the Federal Government. Until very recently all matters connected with contracting for the care and subsistence of Federal prisoners and broad general questions connected with the administration of the Federal penal institutions were handled by the general agent of the Department of Justice. The penal institutions were, to all practical purposes, under the independent control of

the wardens. * * * Legislation is needed to establish a bureau which is definitely charged with the duty of supervising the care and treatment of Federal offenders. It is also needed to remove any question as to the extent of the control of the central office over the wardens and officers of the institutions. The first two sections of the proposed bill will accomplish this end.

One of the most perplexing problems facing the penal officials is how to provide for the safe-keeping, care, and subsistence of persons awaiting trial, held as witnesses, or serving short sentences. The Federal Government is now powerless to remedy the deplorable conditions of filth, contamination, and idleness which is present in most of the antiquated jails of the country, for it is wholly dependent upon the charity of the States. It is obliged to pay the States the rates they charge for boarding Federal prisoners, even though they may be exorbitant. * * *

It is doubtful if the Federal Government ought ever to have a complete system of jails paralleling similar institutions now found in the political subdivisions of the various States. It is possible, however, for the central Government to improve conditions by certain administrative revisions. * * *

first two sections of the resulting legislation established Bureau of Prisons and charged it with responsibility for safe-keeping, care, protection, instruction, and dis-ine" of federal prisoners. 46 Stat. 325.

Section 3 provided:

> It shall be the duty of the Bureau of Prisons to provide suitable quarters for the safe-keeping, care, and subsistence of all persons convicted of offenses against the United States, charged with offenses against the United States, or held as witnesses or otherwise. For this purpose the Director of the Bureau of Prisons may contract, for a period not exceeding three

> years with the proper authorities of any State * * * for the imprisonment, subsistence, care, and proper employment of any person held under authority of any United States statute: * * * .

Ibid. The statute went on to provide that the rates to be paid shall "take into consideration the character of the qua furnished, sanitary conditions, and quality of subsistence", were to be "such as will permit and encourage the proper aut ities to provide reasonably decent, sanitary, and healthful quarters * * * ." Ibid. These provisions are now codified 18 U.S.C. 4002 and 4042.

It is apparent from this legislative history that the congressional purpose was to centralize control over the tre ment of federal prisoners. There is no suggestion in the debates or the committee reports of an intent to give prison a new federal cause of action for inadequate treatment. The statute was basically no different from any federal statute establishing a new agency of government and defining its dut and responsibilities. Certainly there is no general rule of law which confers a federal right of action on the part of person injured by a failure to fulfill federal statutory dut imposed on a federal agency, against the individual involved be he an employee of the agency or an independent contractor And there is nothing in 18 U.S.C. 4042 to suggest that there is something special about the Bureau of Prisons, which woul result in its employees and contractors being subject to a federal cause of action not available against other governme employees and contractors.

4. To the extent that 18 U.S.C. 4042 can be read to .bit a congressional purpose to protect federal prisoners, creation of a federal cause of action against the indi- ual jailer is not "necessary to make effective the congres- al purpose." J. I. Case v. Borak, 377 U.S. 426, 433. For r remedies exist to compensate the injured prisoner. If jailer is a federal employee for purposes of the Tort ms Act, an action lies against the United States. United es v. Muniz, 374 U.S. 150. If not, an action against the vidual jailer lies under the laws of many states. Hill v. ry, 280 F. 2d 88 (8th Cir. 1958), certiorari denied, 364 875 (Missouri law); Indiana ex rel. Tyler v. Gobin, 94 48 (C. C. Ind. 1899); Asher v. Cabell, 50 Fed. 818 (5th 1892) (Texas law); Magenheimer v. State, 120 Ind. App. 90 N.E. 2d 813 (1950); Smith v. Miller, 241 Iowa 625, 40 . 2d 597 (1950); O'Dell v. Goodsell, 149 Neb. 261, 30 . 2d 906 (1948); Hixon v. Cupp. 5 Okla. 545, 49 Pac. 927 7); Kusah v. McCorkle, 100 Wash. 318, 170 Pac. 1023 (1918). he present case, the prisoner has an action against either County or the Sheriff under the California Tort Claims Act 963. Cal. Government Code, §§ 815.2, 820. Other states allowed direct suit against the state or municipality lf for prisoner injuries. Paige v. New York, 269 N.Y. 199 N.E. 617 (1936); Shields v. Durham, 118 N.C. 450, .E. 794 (1896); Hargrove v. Cocoa Beach, 96 So. 2d 130 . 1957); Turner v. Peerless Ins. Co., 110 So. 2d 807 (La.). See Note, 63 Yale L. J. 418, n. 52 (1954) (citing

Illinois case). Since these alternative remedies are avail-
able, there is no reason to infer an additional federal reme

There are, to be sure, some states in which suits agair
prison officials or the state or local government is not per
mitted. See United States v. Muniz, 374 U.S. 150, 164. How
ever, in such cases the state law reflects state policy rega
ing the protection of public officials and the maintenance o
discipline in state and local prisons; there is nothing in
the legislative history of 18 U.S.C. 4042 to suggest a congr
sional intent to override such state policies.

II.

WHERE A FEDERAL CLAIM IS DISMISSED ON THE PLEADINGS, PENDENT JURISDICTION DOES NOT REQUIRE TRIAL OF THE STATE CLAIM.

The prisoner concedes, as he must, that there is no pendent jurisdiction with respect to his action under the Tort Claims Act. Benbow v. Wolfe, 217 F. 2d 203 (9th Cir. 1954); Radford v. United States, 264 F. 2d 709 (5th Cir. 195 Wasserman v. Perugini, 173 F. 2d 305 (2d Cir. 1949). Howeve he contends that since the court had federal question jurisd to decide whether the complaint stated a federal cause of ac tion under 18 U.S.C. 4042, the doctrine of Hurn v. Oursler, 289 U.S. 238, required the district court to assume pendent

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6/ Compare J. I. Case Co. v. Borak, 377 U.S. 426, where th Court concluded that alternative remedies were not adequate achieve the congressional purpose. The existence of adequat state remedies has been stressed as a ground for refusal to imply a federal cause of action from federal regulations. E v. Florida National Bank at Orlando, 357 F. 2d 27 (5th Cir. (federal regulation governing trust departments of national tinued)

isdiction over his state claim for negligence.

In Hurn v. Oursler, it was held that a federal court had isdiction over a claim for unfair competition under state joined with a federal claim for copyright infringement, n though the federal claim was dismissed on the merits. How- r, in Hurn v. Oursler, the district court held a trial on merits of the federal claim before dismissing it; and dis- ition of the merits of the state claim was warranted on the is of the facts already tried in connection with the fed- l claim. In subsequent cases, the courts have made it plain t Hurn v. Oursler will not be applied where assumption of isdiction over the state claim would require an additional al of facts not required for disposition of the federal im. Thus where the federal claim is dismissed on the plead- s, the doctrine of pendent jurisdiction does not require the trict court to proceed with a trial of the state claim. sachusetts Universalist Convention v. Hildreth & Rogers , 183 F. 2d 497, 501 (1st Cir. 1950); Strachman v. Palmer, F. 2d 427, 433-34 (1st Cir. 1949) (Magruder, C. J., con- ring); State of Georgia v. Wenger, 187 F. 2d 285, 287-88

(continued) banks does not create federal cause of ac- n for breach of trust); Moungey v. Brandt, 250 F. Supp. (W.D. Wisc. 1966) (federal air safety regulations do not ate federal cause of action for negligence). See Note, plying Civil Remedies from Federal Regulatory Statutes," Harv. L. Rev. 285, 292, 294-5 (1963).

(7th Cir. 1951), certiorari denied 342 U.S. 822. As the court stated in Moungey v. Brandt, 250 F. Supp. 445, 454 (W.D. Wis. 1966): "this action has not reached the trial stage in federa court and * * * no economy in time or money, and no greater expedition, would be realized if this court were now to undert to deal with the possible [state] cause of action on the merit To hold that a federal claim which is dismissed on the pleadir requires trial of a state claim would truly be a case of "the tail wagging the dog." Such a result is not required by Hurn Oursler.

III.

THE DEFINITION OF "EMPLOYEE" IN THE FEDERAL TORT CLAIMS ACT DOES NOT ENCOMPASS INDEPENDENT CONTRACTORS

As noted above (at pp. 8-9), we do not believe that the question of whether the Sheriff and Supervisors of San Die County are "employees" of the United States for purposes of th custody of federal prisoners is relevant to this appeal. The sole question here is whether a federal claim has been stated against these parties under 18 U.S.C. 4042; and for the reason we have outlined, we do not believe that statute creates a fed claim against any individual jailers, be they state or federal employees. However, since the question of appellees' status under the Federal Tort Claims Act has been briefed by the part we shall discuss it here.

In contending that appellees are "employees" under the Tort Claims Act, the prisoner does not, apparently, seek to establish that they fall within the traditional common-law tes

employment. See Restatement of Agency 2d, Section 220.
her, reliance is placed on the provision of the Tort Claims
which includes in the definition of "employee" (for whose
s the Act renders the government liable) "persons acting on
alf of a federal agency in an official capacity, temporarily
permanently in the service of the United States, whether with
without compensation." 28 U.S.C. 2671. The argument, as we
erstand it, is that even persons who are independent con-
ctors within the common-law meaning of that term fall within
statutory definition of "employee" of the United States,
n they are carrying out a duty placed by statute on a federal
ncy.

This argument runs contrary to all the decided cases on
nt, which hold that the United States is not liable under the
t Claims Act for the acts of common-law independent contractor
k v. United States, 270 F. 2d 110 (9th Cir. 1959); Dushon v.
ted States, 243 F. 2d 451 (9th Cir. 1957), certiorari denied
U.S. 933; Dunn v. United States, 327 F. 2d 59 (6th Cir. 1964)
her v. United States, 356 F. 2d 706 (6th Cir. 1966), certiora
ied 385 U.S. 819; Strangi v. United States, 211 F. 2d 305
h Cir. 1954); Dixon v. United States, 296 F. 2d 556 (8th Cir.
1); United States v. Page, 350 F. 2d 28 (10th Cir. 1965),
tiorari denied 382 U.S. 979. The fact that the independent
tractor is performing a duty which is vested by statute in
federal agency does not change the result. Indeed, this is
case in virtually every independent contractor situation.
s, for example, the independent contractor in Fisher v.

United States, supra, was engaged in delivery of mail, a duty vested by statute in the Post Office Department. Similarly, t independent contractor in Strangi v. United States, supra, wa engaged in the construction of a dam, a duty vested by statut in the Corps of Engineers. See 211 F. 2d at 306 n. 3. Yet i both these cases it was held that the United States was not l for the torts of the independent contractor.

Appellant argues that the Bureau of Prisons cannot be allowed to insulate itself from tort liability by contracting out its statutory duty of caring for federal prisoners. Yet the courts have unanimously rejected the contention that the government may be held liable for the torts of an independent contractor under a "non-delegable duty" theory. Dunn v. United States, supra; Dushon v. United States, supra; United S v. Page, supra.[7/] Thus a federal agency may insulate the gover ment from tort liability by contracting out its work -- unless of course, in the selection of a contractor there is negligenc for which recovery may be had under the Tort Claims Act. (The is no charge here of negligence in the Bureau of Prison's sele tion of the San Diego County Sheriff as a jailer for appellant The argument that a federal agency may not delegate its statut duties to an independent contractor is especially weak in the instant case, since the statute here specifically authorizes t Bureau of Prisons to contract with state and local authorities for the custody of federal prisoners. 18 U.S.C. 4002.

7/ Indeed, the contention that the United States should be hel liable for the torts of an independent contractor has been re- jected even where extra-hazardous work was involved. United S v. Page, supra; Dunn v. United States, supra; Dushon v. United States, supra. Appellant does not, of course, claim that the custody of prisoners is extra-hazardous work.

The statutory language on which appellant relies-- defining
loyee" for purposes of the Tort Claims Act to include
sons acting on behalf of a federal agency in an official
city, temporarily or permanently in the service of the
ed States, whether with or without compensation" (28 U.S.C.
) -- was not designed to cover independent contractors. This
uage suggests nothing more than a Congressional purpose to
ude those persons voluntarily rendering service to the
rnment on a temporary basis, or without compensation or for
minal salary, as, for example, the "dollar a year man."
Gottlieb, The Federal Tort Claims Act -- A Statutory
rpretation, 35 Geo. L.J. 1, 11 n. 36 (1941). In explaining
identical language as contained in the definition of "employee"
tort claims bill introduced in 1942, Assistant Attorney
ral Shea stated that the definition would "cover air-raid
ens for instance, provided they are in the service of the
ed States and are acting within the scope of their official
ority on behalf of a Federal agency." Hearings, House
ittee on the Judiciary on H.R. 5373 and H.R. 6463, 77th Cong.
ess., at p. 16. The House Committee, accepting this inter-
ation, felt it necessary specifically to exclude air raid
ens and fire wardens from the bill it reported in 1942. 8/

Recognizing that the Tort Claims Act as passed in 1946 was
culmination of years of legislative effort, the Supreme
t has drawn on the legislative history of bills in prior
s to interpret the Act. See United States v. Muniz, 374 U.S.
155-56; Dalehite v. United States, 346 U.S. 15, 26-30. In
hite, the Court relied heavily on the history of the bills
idered in 1942, including the hearings referred to in the

H.R. Rep. No. 2245, 77th Cong. 2d Sess., at p. 1. When the A was passed, in 1946, the concern for air raid wardens had, of course, passed, and thus this exception was not included. Ho ever, the Congressional concern with this type of worker unde scores Congress' understanding that the thrust of the statuto definition was to include individuals working for the governm in a status similar to that of regular employees.

Government liability under the Tort Claims Act is premis on the theory of respondeat superior -- a theory which has traditionally barred liability for the negligent acts of inde contractors. Moreover, the provision of the Act that the United States shall be liable "in the same manner and to the extent as a private individual under like circumstances" (28 2674) reflects the philosophy that, generally speaking, the United States has the liability of a private employer -- and private employers are not usually liable for the torts of independent contractors.[9/] In addition, the provision of the explicitly excluding from the definition of "federal agency" "contractor with the United States" (28 U.S.C. 2671) reinforc the conclusion that the Act was not intended to render the government liable for the acts of independent contractors.

9/ Of course, the question of who is an employee for purpose of the Act is a federal rather than a state question, and thu it is possible for government liability to differ on this sco from the liability of a private employer under state law. Ho ever, the federal courts, in construing the Act's definition "employee", have generally followed common-law concepts. Brucker v. United States, 338 F. 2d 427, 428 n. 2 (9th Cir. 1 certiorari denied 381 U.S. 937.

lant's suggested construction of the Act would render the
nment liable generally for the acts of its contractors,
government contractors typically perform activities which
ontracting federal agency is authorized or required by law
rform. This construction would, accordingly, represent a
al departure from the basic purpose of the Act to hold the
nment to the respondeat superior liability of a private
yer.

The use of state jails for the custody of federal prisoners
from the first days of the Republic, and the Supreme Court
considered the question of the relationship between the
jailers and federal officials. In Randolph v. Donaldson,
nch (13 U.S.) 76, the issue was whether a judgment creditor
recover against a federal marshal for the escape of his
ent debtor from a state prison, to which he had been
tted after having been taken into custody by the marshal's
y under process of a federal court. The Supreme Court held
the marshal was not liable, on the ground that he did not
in a respondeat superior relationship to the state jailer:

> The keeper of a state jail is neither in fact, nor in law, the deputy of the marshal. He is not appointed by, nor removable at the will of the marshal. When a prisoner is regularly committed to a state jail, by the marshal, he is no longer in the custody of the marshal, nor controllable by him. The marshal has no authority to command or direct the keeper, in respect to the nature of the imprisonment. The keeper becomes responsible for his own acts, and may expose himself to the 'pains and penalties' of [state] law.

nch (13 U.S.) at 86. Similarly here, the San Diego County
ff is not appointed by nor removable by federal officials,

and he is responsible for his own acts under the California T
Claims Act (under which individual officials may be sued). C
Government Code § 820. To be sure, the 1930 legislation
(discussed above at pp. 14-16 , supra) authorized the Burea
of Prisons to provide by contract for the conditions of custo
accorded to federal prisoners in state jails. However, this
no different, for purposes of respondeat superior, from the
general requirement of the Walsh-Healey Act that government
contracts must include stipulations for safe working conditio
of the contractor's employees (41 U.S.C. 35(e)); such stipula
tions have been held not to render the contractor an "employe
for purposes of the Tort Claims Act. Strangi v. United State
211 F. 2d 305 (5th Cir. 1954); Dunn v. United States, 327 F.
59 (6th Cir. 1964). Since 1930, the holding of Randolph v.
Donaldson, supra, has been followed in Optner v. Bolger,
95 F. 2d 241 (6th Cir. 1938). A contrary holding would rende
the government liable for the acts of a vast number of its co
tractors, contrary to the terms and purpose of the Tort Claim

The opinion in Randolph v. Donaldson contains a dictum t
"[f]or certain purposes, and to certain intents, the state ja
lawfully used by the United States, may be deemed to be the
jail of the United States, and that keeper to be the keeper o
the United States." 9 Cranch (13 U.S.) at 86. However, as
the holding of the case makes clear, respondeat superior
liability is not one of the purposes for which the Sheriff of
San Diego County may be deemed to be a "keeper of the United
The dictum in Randolph v. Donaldson has been relied on to hol

te jailer answerable to a federal court for cruel and unusual ishment inflicted on a federal prisoner committed to his tody. In re Birdsong, 39 Fed. 599 (S.D. Ga. 1889). It has o been cited to support a holding that a state jailer is in tempt of a federal court for failure to confine a prisoner mitted to his jail by order of the federal court, where te law requires the acceptance of federal prisoners. parte Shores, 195 Fed. 627 (N.D. Iowa 1912). However, these dings merely represent a necessary exercise of power by the eral courts to protect the constitutional rights of prisoners, to effectuate orders of commitment issued by the federal rts. Nothing in these cases affects the question of the pondeat superior liability of the federal government.

In Reid v. Covert, 351 U.S. 487, 489-90, the Supreme Court d -- also in reliance on the dictum in Randolph v. Donaldson -- t the Superintendent of the District of Columbia jail is an ficer or employee" of the United States for purposes of the tute regarding direct appeals to the Supreme Court in cases which a district court has held an Act of Congress unconsti- ional. 28 U.S.C. 1252. (The statute applies only where e United States or any of its agencies or an officer or loyee thereof" is a party.) However, the Court pointed out t the Supreintendent was responsible to an officer selected the District of Columbia Board of Commissioners, which was turn appointed by the President. See 351 U.S. at 489. The Diego County Board of Supervisors is not, of course, ap- nted by any federal official. In addition, the Court in

Reid v. Covert stated that it would construe 28 U.S.C. 1252 i accordance with the Congressional purpose to provide a "promp review of the constitutionality of federal acts." 351 U.S. a 490, quoting Fleming v. Rhodes, 331 U.S. 100, 104. By contra the definition of "employee" in the Tort Claims Act should be construed in accordance with the Congressional purpose to sub the United States generally to the liability of a private employer under state law -- a liability that does not extend the acts of independent contractors.

CONCLUSION

The judgment of the district court should be affirmed o the ground that appellant has not stated a claim against the Sheriff of San Diego County and the County Board of Supervisors within the jurisdiction of the district court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of September, 1968, served two copies of the foregoing Brief for the United States Amicus Curiae, by air mail, postage prepaid, upon counsel as follows:

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